

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP1655-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2005CF290

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD E. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. In this anonymous tipster case, Donald E. Harris appeals from a judgment entered on his guilty plea to possession with intent to deliver cocaine and from the order denying his motion for postconviction relief.

He seeks to withdraw his plea on the basis that search warrants issued without probable cause. We affirm.

¶2 In March 2005, Harris was charged with possession with intent to deliver cocaine in violation of WIS. STAT. § 961.41(1m)(cm)4. (2007-08).¹ The State's case relied on evidence seized pursuant to search warrants executed at Harris' residence and in a vehicle registered to his wife. Harris argues that the evidence should have been suppressed because the warrants issued upon an insufficient showing of probable cause.

¶3 The search warrant applications were based on City of Racine police officer David Shortess' affidavits. The affidavits refer to information provided by a "concerned citizen" who telephoned a drug tip line. The anonymous caller reported observing a black male in possession of what the tipster knew from personal experience to be crack cocaine at 5910 Margery Drive, Apartment 201, and a dark green Ford Windstar vehicle with license plate number 511HNZ. The tipster stated that the approximately fifty-year-old male lived at the Margery Drive address and was about six feet tall, 170 pounds and of medium build. The caller reported making the observations within the past seventy-two hours

¶4 Before acting on the tip, Shortess checked the caller's information against police department records. The records linked Harris' name with the address, showed an April 1955 birth date, revealed a substantial criminal history for weapons violations, robbery and drug offenses and showed that he was under the Department of Corrections' supervision for drug-related convictions. Shortess

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

was familiar with Harris from other complaints to the tip line over the prior three months which reported that Harris sold crack cocaine from a particular Lathrop Avenue address, and from a burgundy Cadillac with a specified license plate number at a particular location. Harris' probation officer confirmed to Shortess that Harris and his wife, Emma, live at the Margery Drive address but previously lived at the named Lathrop Avenue address. Department of Transportation records listed the Windstar to Emma Harris at the Margery Drive address. Based on this information, the magistrate issued the warrants. The ensuing searches of his residence and vehicle yielded powder and crack cocaine.

¶5 Harris was charged with possessing more than forty grams of cocaine with intent to deliver. Harris moved to suppress the evidence on the basis that the search warrants relied on an anonymous caller whose information lacked sufficient indicia of reliability to establish reasonable suspicion that criminal activity was afoot. The court denied the motion and Harris pled guilty.

¶6 Postconviction, Harris successfully moved to withdraw his plea because the plea questionnaire and colloquy misstated the actual charge.² Represented by new trial counsel, Harris asked the court to reconsider the earlier suppression motion on grounds that it had addressed anonymous tips in a reasonable suspicion framework but that probable cause was the proper standard. The court denied the motion on grounds that police corroborated the information in the two affidavits, giving the issuing judge "ample and sufficient information" to issue warrants for both Harris' residence and vehicle.

² Harris was charged with possession with intent to deliver more than forty grams of cocaine, but the plea questionnaire/waiver of rights form said "less than forty grams." Relying on the plea questionnaire, the trial court also said "less than" when conducting the plea colloquy.

¶7 Harris pled guilty to possession with intent to deliver more than forty grams of cocaine, as a repeater. The court sentenced him to seven years' imprisonment, bifurcated as five and a half years' initial confinement and one and a half years' extended supervision. The court also ordered that he pay a fine of \$10,000, plus costs, within sixty days of discharge from extended supervision or serve six months in jail. Harris filed a motion for postconviction relief seeking either to vacate the portion of the sentence imposing the \$10,000 fine plus costs or, alternatively, to order a hearing to determine his ability to pay. The court denied the motion on June 2, 2008. Harris appeals.³

¶8 In reviewing a finding of probable cause to issue a search warrant, we give "great deference" to the magistrate's probable cause determination. *State v. Marquardt*, 2005 WI 157, ¶23, 286 Wis. 2d 204, 705 N.W.2d 878. The finding stands unless the defendant shows the facts are "clearly insufficient" to support the probable cause finding. *Id.* The issuing judge applies a totality of the circumstances test to make a practical and commonsense decision whether a fair probability exists that contraband or evidence of a crime will be found in a particular place. *See State v. Marten*, 165 Wis. 2d 70, 75, 477 N.W.2d 304, 306 (Ct. App. 1991). The reliability of an unnamed informant's statements also is analyzed under a totality of the circumstances test. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also State v. Boggess*, 115 Wis. 2d 443, 453, 340 N.W.2d 516 (1983). Such circumstances may include the presence of detail in the

³ The notice of appeal says that Harris is appealing from the judgment of conviction "and from the order denying postconviction relief entered on June 2, 2008." Harris has briefed arguments relating only to the judgment of conviction, however. We confine our review accordingly. *See Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

information, and corroboration of details of an informant's tip by independent police work. *Boggess*, 115 Wis. 2d at 455.

¶9 Harris argues that the caller's information was insufficiently reliable to establish probable cause. Specifically, he argues that reliability is uncertain because the tipster was anonymous, the information imparted about his address, vehicle and physical description was readily observable and the tip offered no predictive information. The State responds that the tip was reliable because the caller received no compensation for it, and the police corroborated much of the information before acting on it. Further, while predictive information may bolster a tip's credibility, it is not necessary to finding a tip reliable. See *State v. Kolk*, 2006 WI App 261, ¶18, 289 Wis. 2d 99, 726 N.W.2d 337.

¶10 The totality of the circumstances supports a finding of probable cause. The report was made within seventy-two hours of the caller personally observing possession of the drug. Even if the descriptive information in the anonymous tip was somewhat innocent, its reliability may be strengthened by police corroboration of details of the tip. See *State v. Williams*, 2001 WI 21, ¶39, 241 Wis. 2d 631, 623 N.W.2d 106. It is probable that an informant shown to be right about some allegations also is right about others, including the claim that the object of the tip is engaged in criminal activity. *State v. Richardson*, 156 Wis. 2d 128, 141, 456 N.W.2d 830 (1990) (citations omitted). Because the informant proved to be correct about Harris' physical description, address and the make and license plate number of a vehicle he reasonably could have use of, we may infer that the tipster also was correct about the apparently illicit activity. See *id.* The information the caller provided alone might have made for a close case. The additional investigation tipped the scales in favor of establishing probable cause.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

